In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 859

2000 PLASTIC TUBULAR CASES, MORE OR LESS, ETC. AND DR. E. J. KNOX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This is an *in rem* proceeding under the Federal Food, Drug and Cosmetic Act for the condemnation, as misbranded, of 2000 plastic tubular cases called "Dr. Knox's Gumbrush Training Kit", each containing two toothbrushes, together with accompanying instructions and advertising. The literature which accompanied the cases is set forth at pp. 6-7 of the petition. The district court's opinion granting the government's motion for summary judgment appears as

an appendix to the petition (Pet. App. 1b-7b), with notes added by petitioner.[1] That opinion, when read with the literature, demonstrates that there was ample basis for entry of summary judgment. As we understand the petition, claimant is arguing that the district court improperly concluded that he admitted that the broad claims in his labelling could not be sustained. The district court first found from the face of the advertising (which was to the effect that petitioner and his product were the conquerors of gum diseases) that the labelling created the impression "that by gum brushing, existing gum disease will be overcome or cured, or at the very least, gum disease will be prevented" (Pet. App. 4b). The district court then pointed out that petitioner's answer stated only that "gumbrushing correctly employed from youth will prevent most gum disease" and that this was "quite different from a claim that he and his device have conquered gum disease" (Pet. App. 5b-6b). It therefore correctly reached the conclusion that, on this aspect alone, the devices were misbranded.

While the district court also relied on the affidavit of Dr. Davis (submitted by the government) stating that gum brushing is ineffective to prevent and overcome gum disease (Pet. App. 4b), the decision below may be sustained even without reference thereto. The district court found it unnecessary to reach the aspect of the labelling dealing with the prevention of cancer, heart disease and defective birth of offspring

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[1] The *per curiam* affirmance of the court of appeals appears at Pet. App. 8b.

although it seems evident, from the face of the labelling, that the libel could be sustained on that ground as well.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

JANUARY 1966.

END